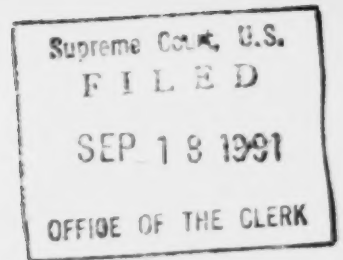


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NO. 91-293



**IN THE SUPREME COURT OF
THE UNITED STATES**

October Term, 1991

**SOUTHERN PACIFIC TRANSPORTATION
CO., PETITIONER**

v.

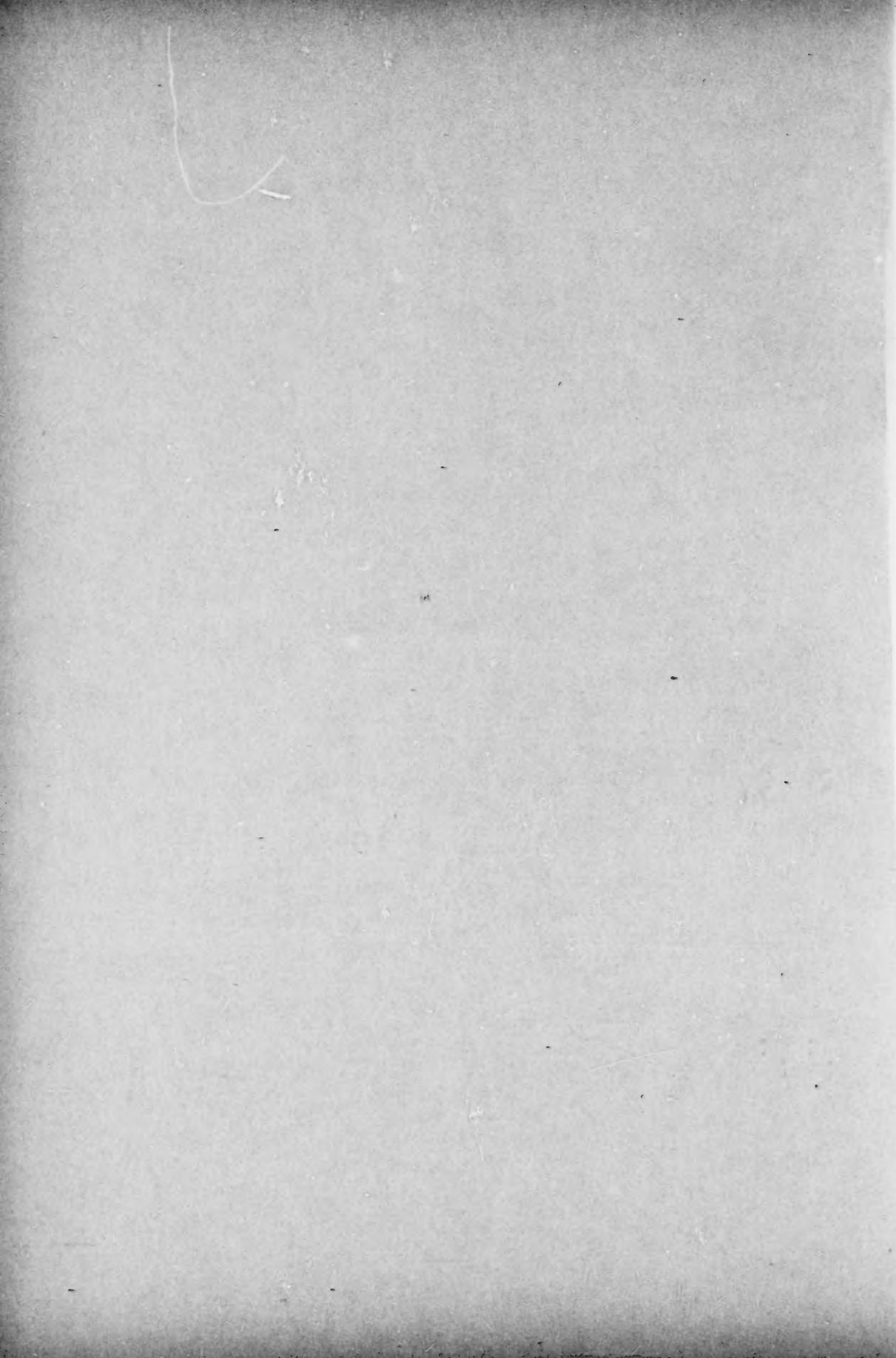
JOSE HERNANDEZ, RESPONDENT

**ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS FOR THE FOURTH
SUPREME JUDICIAL DISTRICT OF TEXAS**

**RESPONSE TO THE PETITION
FOR WRIT OF CERTIORARI**

**RODNEY V. STEINBURG
JOHN A. CARWILE**
Counsel for Respondent

Steinburg & Bryant
1301 McKinney, Suite 3600
Houston, Texas 77010-3090
(713) 654-7800



QUESTION PRESENTED

In *Norfolk and W. Ry v. Liepelt*, 444 U.S. 490 (1980), this Court held it was error to refuse to instruct the jury in an F.E.L.A. case that damage awards were not subject to federal income taxation. In this case the trial court refused to instruct the jury on the non-taxability of the award. The appellate court found the refusal to be error, but applied a harmless error test to determine whether the case should be remanded for a new trial. Finding that the error was harmless, the appellate court affirmed. The real question presented for this Court's review is the following:

Is the *Liepelt* instruction subject to a harmless error standard of review, as all other jury instructions are, or will an exception to the harmless error rule be created for *Liepelt* instructions?

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**SOUTHERN PACIFIC TRANSPORTATION
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v.

JOSE HERNANDEZ, RESPONDENT

**ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS FOR THE FOURTH
SUPREME JUDICIAL DISTRICT OF TEXAS**

Respondent, Jose Hernandez, respectfully prays that a writ of certiorari be denied.

STATEMENT OF THE CASE

This was a suit for damages for personal injuries sustained in an on the job accident. The suit was filed and tried pursuant to the Federal Employers' Liability Act, 45 U.S.C.A. §§ 51-60.

Hernandez called Everitt Dillman, Ph.D., to testify regarding the economic losses sustained by Hernandez.

During his testimony as an expert in economics, Dr. Dillman addressed the fringe benefit issue. He testified that Hernandez had received fringe benefits from the Petitioner. He estimated those benefits to be equal to 42.8% of Hernandez's salary, even though a figure of 26% was used for his computations. Hernandez's loss of fringe benefits was included in Dr. Dillman's analysis of Hernandez's loss of earning capacity.

When asked about Hernandez's after-tax income, and his take-home pay, Dr. Dillman testified that Hernandez's after-tax income for 1986 was his gross earnings of \$32,347, minus his income tax of \$3,162, for a net, after-tax income of \$28,245. Dr. Dillman was then asked, by Petitioner's counsel, a number of questions regarding Petitioner's records that showed a "take-home pay" of only \$20,263. Dr. Dillman stated that he did not know what deductions were from Hernandez's salary but he indicated that he had no arguments with that figure.

Petitioner then requested an instruction that would have deprived Hernandez of his fringe benefit claim, and would have equated after-tax income and "take-home pay", even though the evidence indicated that these figures were not the same.

Dr. Dillman estimated the past lost earnings to be \$58,000 and the future loss of earning capacity, assuming 100% disability, to be \$1,344,515. Since Dr. Carlos Arazoza had given Hernandez an impairment rating of 35 to 40%, Dr. Dillman used those figures and computed a future loss of earning capacity of \$350,000 to \$400,000. Since Hernandez's last employment prior to the Railroad was as a clerk earning \$6.00 per hour Dr. Dillman used that figure and computed a future loss of earning capacity of \$600,000.

The jury found that the past lost wages were \$48,520.14 and that the future lost wages were \$400,000.00.

Dr. Dillman testified that he deducted income taxes from Hernandez past and future wage losses and his report, which also indicated that income taxes were deducted, was admitted into evidence as Plaintiff's Exhibit 10.

Petitioner had requested an instruction regarding the non-taxability of the jury's award for the past and future wage losses. This instruction was refused and Petitioner has been unable to show that it was harmed by the refusal. In fact, Petitioner has conceded in previous briefs that it cannot show harm. In light of Dr. Dillman's testimony that income taxes had already been deducted from his figures, and in light of the fact that the jury's total award was \$744,000 less than Dr. Dillman's highest figure, it is clear that Petitioner was not harmed by the refusal.

REASONS FOR DENYING THE WRIT

- I. *The requested tax instruction was properly refused as it was an incorrect statement of the law and was impossible to apply to the facts of this case.*
- II. *The application of a harmless error rule is consistent with the decisions of this Court.*
- III. *The application of a harmless error rule is consistent with the decisions of the Second, Third, Eighth and Ninth Circuits.*

SUMMARY OF THE ARGUMENT

In *Norfolk & Western Ry Co. v. Liepelt*, 444 U.S. 490 (1980) this Court determined that a defendant was entitled to a jury instruction regarding the non-taxability of the damage award. The issue now before this Court is whether a trial court's refusal to give the non-taxability instruction will be reviewed in accordance with a harmless error rule such as Rule 81, Texas Rules of Appellate Procedure. The appellate court correctly held that a harmless error rule should be used. In light of the fact that Petitioner has failed to show any harm (and has admitted in previous briefs that it cannot show harm), Petitioner argues that the a harmless error rule should not be used, claiming that the Rule is contrary to this Courts precedents and two Fifth Circuit cases.

This Court's authority to reverse and remand is set forth in 28 U.S.C.A. §2111. That statute provides that the Court can reverse and remand a case only if the Court finds that an error was harmful. It is the Supreme Court's version of the harmless error rule. The statute was obviously followed in *Liepelt*, as the Court found that the error in that case was harmful. The Court again followed the statute in *Gulf Offshore Co. v. Mobil Oil Co.*, 453 U.S. 473 (1981) by specifically ordering the lower court to address the claim of harmless error. Thus, the relevant federal statute and the Supreme Court cases cited above indicate that the federal courts should apply a harmless error rule to this case. The holding of the appellate court is consistent: The harmless error rule applies to this case.

The authority for the federal courts to reverse and remand is also found in Rule 61, Federal Rules of Civil Procedure. That rule provides that a trial court can be reversed only if the court committed an error that was harmful. It is another federal harmless error rule. The rule has been followed

in at least seven cases decided by the federal courts of appeal, and the harmless error rule is clearly the majority rule in the federal courts. Of the two Fifth Circuit cases cited by Petitioner, both were decided prior to the Supreme Court's holding in *Gulf Offshore* and one of the cases does not even discuss the issue before this Court.

The Court of Appeals holding, that the harmless error rule will apply to this case, is consistent with the holdings in *Liepelt*, *Gulf Offshore*, seven federal cases from the Second, Third, Eighth and Ninth Circuits, as well as 28 U.S.C.A. §2111 and Rule 61, Federal Rules of Procedure. Quite simply, there is no conflict between the holding of the appellate court and the relevant federal authority.

In any event, the trial court's refusal to give the non-taxability instruction was correct for two reasons. First, the instruction was impossible to apply under the facts of this case. It referred to Hernandez's recovery of "the net, after-tax income." It then indicated that after-tax income was the same as "take-home pay". The evidence during trial was very clear that Hernandez's net, after-tax income was not the same as his take-home pay. In light of this evidence, the instruction was not only incorrect, but it would have been impossible for the jury to apply.

Second, the instruction was incorrect. It is undisputed that Hernandez is allowed to recover the fringe benefits that he had lost as part of his loss of earning capacity. The requested instruction specifically tells the jury that Hernandez is not allowed to recover his loss of fringe benefits. The instruction would have prevented the recovery of a recognized element of damage. Any instruction that tells the jury not to award a recognized element of damage is properly refused.

ARGUMENT ON REASON NO. I

The requested tax instruction was properly refused as it was an incorrect statement of the law and was impossible to apply to the facts of this case.

Recognizing that the facts of each case vary, the drafters of the Fifth Circuit's Pattern Jury Instructions for Civil Cases included the following caveat:

"Unlike criminal prosecutions under a given statute ... the instructions given in many civil cases will differ according to the facts even though the claim, cause of action or theory of recovery is the same. ... extreme care should be exercised in every case to insure that the instruction as worded correctly states the law as applied in that case ..." (emphasis in original) *Pattern Jury Instructions - Civil Cases*, District Judges Association - Fifth Circuit, 1983, p. v.

One issue in this appeal is whether or not the requested instruction correctly applies the law to the facts of this case. Respondent submits that the instruction fails for two reasons.

First, it fails to consider that Petitioner provided fringe benefits to Hernandez. These benefits were paid for by Petitioner and were estimated to be equal to 42.8% of Hernandez's salary. Hernandez lost the benefits as a result of his inability to return to work for Petitioner. Under these circumstances, the cost or value of the fringe benefits is a part of the compensation that Hernandez has lost and he is entitled to recover for this loss. *Williams v. Reading & Bates Drilling Co.*, 750 F.2d 487 (5th Cir. 1985). *Culver v. Slater Boat Co.*,

722 F.2d 114 (5th Cir. 1983) cert. denied 82 L.Ed.2d 842, 104 S.Ct. 3537 (1984). *Petition of United States Steel Corporation*, 436 F.2d 1256 (6th Cir. 1970) cert. denied 402 U.S. 987, reh. den. 403 U.S. 924, 940.

Having identified one of the facts in this case (the loss of fringe benefits) and having identified the law that applies (Hernandez's right to recover for the loss), let us examine the effect of the requested Instruction. It states, in pertinent part:

"In computing the amount of damages which you may find the Plaintiff is entitled to recover for past or future lost earnings, the Plaintiff is entitled to recover only the net, after-tax income. In other words, Plaintiff is entitled to recover only "take-home pay" which you find he has lost in the past or will lose in the future."

Clearly, this instruction would prevent Hernandez from recovering for the loss of his fringe benefits. Those benefits are not "after-tax income" and do not, by any stretch of the imagination, fit the common definition of "take-home pay". This instruction would have deprived Hernandez of the rights set forth in *Williams*, *Culver* and *Petition of United States Steel*. As such, this instruction misstates the law that applies to the facts of this case.

It is true that the instruction may be appropriate in some other case. For instance, in an F.E.L.A. action where the injured worker was able to return to work for the railroad, and therefore suffered no loss of fringe benefits, the instruction might be appropriate. However, that hypothetical case is not before us and, for the facts of the case that is before us, the instruction misstates the law.

Second, the instruction failed to consider that the evidence showed that the amount of Hernandez's "take-home pay" was different from the amount of his "after-tax income". This difference was made quite clear during the testimony of Dr. Dillman. Petitioner's counsel repeatedly indicated that Petitioner's records showed "take-home pay" that was much less than Dr. Dillman's "after-tax income". Dr. Dillman, using Hernandez's tax returns, indicated a 1986 gross income of \$32,347, with taxes of \$3,162, for an after-tax income of \$28,245. Petitioner's counsel repeatedly indicated that Hernandez's "take-home pay" in 1986 was only \$20,263.91. Obviously, Petitioner was deducting something from Hernandez's paycheck other than income taxes. Two problems arise from this situation.

First, the procedure used to compute an injured person's economic losses is to start with a "net" figure computed by taking the gross earning of the injured person, adding the fringe benefits, and then subtracting income taxes. *Culver v. Slate Boat Co., supra*. This procedure specifically allows an injured person or his economist to calculate the damages based on this net figure. The instruction would deprive Hernandez of this right by requiring him to use "take-home pay". Under the facts of this case, "take-home pay" is lower than the figure that Hernandez was entitled to use. By depriving him of the higher figure authorized in *Culver*, the instruction misstates the law that applies to the facts of this case.

Second, the instruction is impossible to use and would hopelessly confuse a jury. It assumed that the "take-home pay" would be identical to the "after-tax income". This assumption was incorrect. How, then, was the jury to follow the instruction? Should the jury use Dr. Dillman's figure or Petitioner's figure? These questions cannot be answered.

Certainly an instruction that cannot be used is an instruction that should not be given.

Clearly, if Petitioner had requested a correct instruction, it should have been given. Equally clear, Petitioner was not entitled to an instruction that misstated the law or was impossible to apply. Petitioner could have requested the simple instruction approved in *Liepelt*:

"Your award will not be subject to any income taxes, and you should not consider such taxes in fixing the amount of your award." 444 U.S., at 492.

Instead, Petitioner choose an incorrect instruction and the trial court properly refused it.

ARGUMENT ON REASON NO. II

The application of a harmless error rule is consistent with the decisions of this Court.

The issue now before the Court is whether or not the harmless error rule, Rule 81, Texas Rules of Appellate Procedure, is contrary to any authority from this Court.

This Court's authority to review and reverse a lower court is found (in part) in 28 U.S.C.A. §2111. That statute provides:

§2111 - Harmless Error

On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

Obviously this is a harmless error rule, the Court's equivalent to Rule 81, Texas Rules of Appellate Procedure.

Petitioner has made the claim that the Supreme Court has ignored 28 U.S.C.A. §2111 and has held that the harmless error rule does not apply to F.E.L.A. cases. Even a cursory review of the two cases cited by Petitioner will show the absurd nature of this claim.

In *Norfolk and Western Ry Co. v. Liepelt*, 444 U.S. 490 (1980), the state court jury returned a verdict of \$775,000 for the pecuniary losses. This figure was two and one-half times larger than the \$302,000 figure that the economist had testified to. Of significance was the fact that the economist did not deduct income taxes from his figure, and the trial court had excluded all testimony regarding how income taxes would have affected the figure of \$302,000. In addition, the trial court refused to give a non-taxability instruction. The court addressed both issues holding:

- 1) Evidence of how income taxes will effect future earnings is admissible; and
- 2) The non-taxability instruction (the one requested in that case) should have been given.

It is clear that the railroad had been harmed by the trial court's action in *Liepelt*. Not only was the instruction refused, the trial court had also refused all evidence that would show the jury what effect taxes had on future earnings. Without this evidence, it is obvious that the jury's award would include an amount for income taxes, thereby harming the railroad. The railroad did in fact argue that it was harmed. ". . . petitioner contends that it was prejudiced by the trial judge's refusal to instruct the jury . . ." *Id.*, at 693. After considering all the evidence and argument, the Court agreed, concluding that harm had occurred: "It is surely not fanciful to suppose that the jury erroneously believed that a large portion of the award would be payable to the Federal Government in taxes and that therefore it improperly inflated the recovery." *Id.*, at 696.

The *Liepelt* opinion can be summarized as follows:

1. The Court was required to find harm before it could reverse (28 U.S.C.A. §2111).
2. The railroad argued that it was harmed (*Id.*, at 693)
3. The railroad was obviously harmed (all testimony about the effect of taxes had been excluded, and the instruction was refused.
4. The court found harm. *Id.*, at 696)

The Court never said that the harmless error rule was going to be ignored. The court never said that harm could be presumed. On the contrary, the Court examined the facts and determined that harm had occurred. In the case at bar, the appellate court has examined the facts and determined that Petitioner has not shown, and has not even argued, that it was

harmful. This holding does not conflict with *Liepert* in any way and it is consistent with the only other Supreme Court decision on point.

In *Gulf Offshore Co. v. Mobil Oil Corporation*, 453 U.S. 473, 69 L.Ed.2d 784, 101 S.Ct. 2870 (1981) the Court was deciding whether or not a non-taxability instruction was required in actions governed by the Outer Continental Shelf Lands Act, a federal statute. After concluding that state law would provide a partial answer to this issue, the Court remanded the case to the state court so that a determination of state law could be made. The Court concluded its opinion with this order:

"If the court decides that it was the error to refuse the instruction, it may then address respondent's argument that petitioner was not prejudiced by the error." *Id.*, at 798.

This mandate for the state court to address the harmless error argument indicates the Supreme Court's position on the harmless error rule. If the Court was of the opinion (as Petitioner claims) that it was not necessary to show harm, the Court would have said so; the Court would not have wasted the state court's time by ordering it to address the argument. The harmless error argument has to be addressed if, and only if, the harmless error rule is applicable. Logic indicates that if the Supreme Court order is to address the harmless error argument, then the harmless error rule must be in full force and effect.

Obviously, Appellant's interpretation of *Gulf Offshore* is wrong and, equally obvious, the Supreme Court requires a showing of harm, as does 28 U.S.C.A. §2111.

Appellant has not shown any harm. In light of Dr. Dillman's undisputed testimony, and in light of the fact that the verdict for past and future economic losses totalled \$448,520, while the testimony on those issues totalled over one million dollars, it is apparent that Appellant has not been harmed.

ARGUMENT ON REASON NO. III

The application of a harmless error rule is consistent with the decisions of the Second, Third, Eighth and Ninth Circuits.

The federal authority in support of the harmless error rule is extensive. 28 U.S.C.A. §2111 has already been quoted. It is a harmless error rule.

Rule 61, Federal Rules of Civil Procedure, is also a harmless error rule. That rule provides:

Rule 61 - Harmless Error

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

The cases from the Second, Third, Eighth and Ninth Circuits are consistent with the harmless error rule.

In *Vanskike v. ACF Industries, Inc.*, 665 F.2d 188 (8th Cir. 1981) an F.E.L.A. claim was pursued against a railroad. The trial court refused to give a requested instruction on the non-taxability of the award. The court held that the failure to instruct on non-taxability is harmless error unless the appellant establishes the prejudicial effect of the trial court's refusal. The court noted that a great disparity between the evidence and the verdict would be one indication that the jury had improperly inflated the award. The court then concluded that the total award of \$903,000, when compared with the lost wage testimony of \$692,000, did not indicate an improper increase.

In *Flanigan v. Burlington Northern, Inc.*, 632 F.2d 880 (8th Cir. 1980) cert. denied, 450 U.S. 921, 101 S.Ct. 1370, 67 L.Ed.2d 349 (1981) an F.E.L.A. claim was pursued against a railroad. The trial court refused to give a requested instruction on the non-taxability of the award. The court held that the failure to give the instruction is subject to the harmless error rule. The court held that there would be no reversal unless the railroad established harm or prejudice. The court then considered the evidence and found no evidence of harm.

Raycraft v. Duluth, Missabe & Iron Range Ry., 472 F.2d 27 (8th Cir. 1973) also involved a F.E.L.A. claim, and again the trial court refused to give a non-taxability instruction. The court felt that a harmless error rule should apply, noting:

In the instant case . . . there is no indication that the jury verdict resulted from a misapprehension of tax consequences. The members of this panel, if they felt it necessary to rule on the issue, would not hold the action of the trial court erroneous. *Id.*, at 33.

Another Eight Circuit case applying the harmless error rule to jury instructions in a F.E.L.A. case is *Meyers v. Union Pacific Railroad Co.*, 738 F.2d 328 (Eight Cir. 1984). There have been similar holdings in the Second, Third and Ninth Circuits.

In *McWeeney v. New York, New Haven & Hartford Railroad*, 282 F.2d 34 (2nd Cir. 1960) cert. denied 364 U.S. 870, 81 S.Ct. 115, 5 L.Ed.2d 93 (1960) the Court used the harmless error rule to avoid reversing an F.E.L.A. claim when the trial court erroneously failed to give a non-taxability instruction.

In *Domeracki v. Humble Oil & Refining Co.*, 443 F.2d 1245 (3rd Cir. 1971) cert. denied 404 U.S. 883, (1971) the Court adopted the rule that non-taxability instructions were required, when requested by the defendant. In deciding whether or not the new rule should be given prospective application only, or whether it should be used to reverse the instant case, the Court noted that there was no evidence that the jury had considered taxes or inflated the award. Accordingly, the Court affirmed. The harmless error rule had been used to avoid a reversal.

In *Cullinan v. Burlington Northern, Inc.*, 522 F.2d 1034 (9th Cir. 1975) the trial court failed to give a non-taxability instruction. The Court held that there was no indication that the jury mistakenly considered taxes and raised its verdict. In

the absence of such an indication, the Court stated that "it would be improper to overturn the jury's verdict on the mere speculation of prejudice." *Id.*, at 1037.

The opinion of the appellate court is in accord with Rule 81, Texas Rules of Civil Procedure; Rule 61, Federal Rules of Civil Procedure; 28 U.S.C.A. §2111; and 7 opinions from the Court of Appeals for the Second, Third, Eighth and Ninth Circuits.

Against this authority, Petitioner cites only two cases (*O'Byrne* and *Lang*). Both of the cases were decided prior to this Court's decision in *Gulf Offshore* (discussed previously). In light of the Court's recognition of the harmless error rule in *Gulf Offshore*, it is likely that these Fifth Circuit cases were overruled. It should be noted that one of the cases cited by Petitioner (*Lang*) does not even address the harmless error rule: the court just doesn't say whether it did or did not find prejudice. Silence on this issue does not support Petitioner. Since the court is silent, one would assume that the court is following Rule 61, Federal Rules of Civil Procedure and 28 U.S.C.A. §2111.

In light of the overwhelming authority in support of the appellate court's decision in this case, and in light of the fact that *Gulf Offshore* was decided after the cases cited by the Petitioner, there is no reason to believe that the Fifth Circuit does not follow the harmless error rule.

CONCLUSION

The petition for a writ of certiorari should be denied as it was appropriate to refuse the instruction. Moreover, the trial court's action was consistent with precedents from this Court and other courts, as well as the federal statutes and rules cited above.

Respectfully submitted,

RODNEY V. STEINBURG
JOHN A. CARWILE
Counsel for Respondent

September 1991